Great Western Coca-Cola Bottling Company, d/b/a Houston Coca-Cola Bottling Company *and* Sales Drivers, Deliverymen, Warehousemen & Helpers Local 949, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America

Great Western Coca-Cola Bottling Company, d/b/a Houston Coca-Cola Bottling Company *and* Michael C. Neel, Attorney and Sales Drivers, Deliverymen, Warehousemen & Helpers Local 949, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 23-CA-7744, 23-CA-7760, and 23-RD-444

December 9, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 23, 1981, Administrative Law Judge William L. Schmidt issued the attached Decision in this proceeding. Thereafter, both Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Great Western Coca-Cola Bottling Company, d/b/a Houston Coca-Cola Bottling Company, Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Substitute the phrase "in any like or related manner" for the phrase "in any other like manner" in paragraph 1(e).

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held in Case 23-RD-444 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 23 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

IT IS FURTHER ORDERED that the notice of election to be issued in this matter by the Regional Director include the following paragraph:

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[1] Both Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis of reversing his findings.

[2] In its exceptions, Respondent contends that *Vernon Manufacturing Company and Spencer Industries*, 214 NLRB 285 (1974), reconsidered and reaffirmed 219 NLRB 622 (1975), and *Ellex Transportation, Inc. (Formerly Hugh Breeding, Inc.)*, 217 NLRB 750 (1975), have interpreted the Board's decision in *Telautograph Corporation*, 199 NLRB 892 (1972), to mean that, while a decertification petition is pending, an employer is privileged to make unilateral changes in working conditions. In *Dresser Industries, Inc.*, 264 NLRB No. 145 (1982), the Board overruled *Telautograph* and, in effect, overruled *Vernon* and *Ellex* as well. Nevertheless, the possible application of these cases has been considered here since the Board has determined to apply the rule announced in *Dresser*, prohibiting the withdrawal from bargaining in such circumstances, on a prospective basis only. We find that Respondent's unilateral changes in access requirements for union representatives violated Sec. 8(a)(5) of the Act because even under those cases relied on by Respondent an employer is not licensed to interfere with the union's representative functions which continue during the pendency of the decertification petition. The incumbent union remains the employees' bargaining representative until and unless it is decertified. Consequently, we distinguish unilateral changes affecting the union's dealings with the employees whom it continues to represent from those relating to wages and benefits, and find that Respondent's unilateral implementation of restrictions on union access to employees is unlawful. Under these circumstances, we find it unnecessary to consider the possible application of *The Baughman Company*, 248 NLRB 1346 (1980).

In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's finding that Respondent's November 20, 1979, letter did not constitute a unilateral change in working conditions.

Our dissenting colleague's imaginative treatment of the discharge of employee Bailey is totally speculative. He relies on inferences from circumstances not found as facts by the Administrative Law Judge. His recitation of the events leading to Bailey's discharge implies that Bailey was denied the use of an available hose, an allegation which was testified to by Bailey, whose testimony on this point was discredited by the Administrative Law Judge. The dissent then concludes that it is unnecessary to rely on this fact because Bailey could have been allowed to wait for a hose used by others. Such conclusions is pure speculation. The dissent also concludes that Bailey's assignment was "unreasonably onerous," even though the Administrative Law Judge reached precisely the opposite conclusion and thereby clearly indicated his reliance upon the testimony of Supervisor Hill that the task could be adequately performed without a hose. Accordingly, based on the facts of record, we affirm the Administrative Law Judge's conclusion that "the allegations that Bailey was assigned a more onerous task on December 26 and was subsequently discharged for refusing to perform the task [have] not been proven by a preponderance of the credible evidence."

[3] In par. 1(e) of his recommended Order of the Administrative Law Judge used the language "in any other like manner" which is akin to the broad language "in any other manner." Respondent herein has not demonstrated a proclivity to violate the Act, nor has it engaged in conduct so widespread as to demonstrate a general disregard for the employees' fundamental statutory rights. Thus, in our opinion the broad injunctive language is not appropriate and we have modified the recommended Order accordingly. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). We have amended the notice to conform with par. 1(e) as modified herein.

We have corrected the notice so that the designation "Local 929" is changed to "Local 949."

Notice To All Voters

The election conducted on April 17, 1980, was set aside because the National Labor Relations Board found that certain conduct of the Employer interferred with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in exercise of this right, free from interference by any of the parties.

[Direction of Second Election[4] omitted from publication.]

MEMBER JENKINS, dissenting in part:

In adopting the Administrative Law Judge's conclusion that Respondent did not violate Section 8(a)(3) and (1) by discharging employee Charles Bailey, my colleagues have ignored the clear inference to be drawn from the Administrative Law Judge's credibility resolutions and factual findings. In late 1979 Bailey joined with the Union to resist efforts to decertify the Union. He distributed authorization cards and union literature, and talked in support of the Union to other employees. His supervisor, Elbert Hill, became aware of such activities, including Bailey's appointment in early December 1979 to the position of union steward. Hill's animus toward the union is forthrightly revealed by his acknowledgment that he had stated to Bailey he "didn't like the union or anything they stand for and that he wasn't going to let a bunch of blood suckers taking money away from employees every month represent him [Bailey] to his boss."

As found by the Administrative Law Judge, Hill, on December 26, 1979, instructed three employees, including Bailey, to wash the exterior walls of Respondent's Hardy Street warehouse. Although the other two employees were able to use a hose to perform this work. Hill denied Bailey's request for a hose, claiming that none was available. Accordingly, Bailey attempted a number of times unsuccessfully to clean the wall with a rag and a bucket of soapy water. As described by Hill, after Bailey's first attempt to clean the wall, a garage door situated along the wall was a "total mess" and he (Hill) could wipe mud from the door. When Hill instructed Bailey a third time to clean the area Bailey stated that he was being treated like a kid and refused.[5] In reply, Hill told Bailey he was terminated.

In his analysis, the Administrative Law Judge stated:

> Based upon Hill's stated views of unions in general, and Bailey's increased affinity for the Union, there is little doubt that Hill was probably delighted at the opportunity which the December 26 incident presented.

However, the facts show that the individual who created the incident was Hill, not Bailey. If, as the Administrative Law Judge found, there was no rush to have the area cleaned by a particular time, it seems obvious that Bailey could have been allowed to wait for the hose used by the others to become available.[6] Instead, Hill steadfastly insisted that Bailey use the rag and pail of water. Although Bailey initially complied with Hill's instructions, his efforts were without success. The fact that Bailey despaired and refused to try again was a result primarily of Hill's decision to give Bailey the unreasonably onerous task of cleaning the external wall of a warehouse at least partially layered with mud using only a rag and a bucket of soapy water. Thus framed, Bailey's refusal was not to be unexpected, but was rather the fruition of Hill's discriminatorily motivated plan to secure a basis for discharging Bailey. I would find that Bailey's discharge violated Section 8(a)(3) and (1) of the Act.

[4] [*Excelsior* footnote omitted from publication.]

[5] My colleagues are incorrect in contending that a task which could be (eventually) performed as assigned may not also be unreasonably onerous. The test is not one of impossibility.

[6] In this regard it is unnecessary to rely on Bailey's discredited testimony that a hose was available at the time of his request to be able to use it. Accordingly, I expressly accept the Administrative Law Judge's conclusion that no hose was available at that time. However, I do not accept my colleagues' criticism that is "pure speculation" to conclude that Bailey could have been allowed to wait for that hose or any other hose to become available. Scuh a conclusion is fully consistent with the record here.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Ageny of the United States Government

After a hearing becore an Administrative Law Judge at which all parties were provided with the opportunity to present evidence and arguments, the National Labor Relations Board concluded that we violated your rights by refusing to permit agents of Sales Drivers, Deliverymen, Warehousemen & Helpers Local 949, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Help-

ers of America, to come on our premises to represent you; by causing agents of the Union to be arrested when they came to our premises on December 11, 1979, for the purpose of providing an employee with representation; by refusing to give effect to the provision in the expired collective-bargaining agreement after December 13, 1979, whereby agents of the Union are to be permitted access to our premises for the purpose of representing you; by questioning an employee about his membership in the Union; and by making statements to an employee which implied that we were watching your union activities. To remedy these violations, the Board has ordered us to post this notice and to comply with its terms.

The National Labor Relations Act, as amended, gives employees the right to organize themselves, to form, join, or assist unions, to engage in collective bargaining with their employer through representatives freely chosen by a majority of them, to engage in other group activities for their mutual aid and protection on the job, and to refrain from any or all of these activities.

WE WILL NOT question you about whether or not you have joined Sales Drivers, Deliverymen, Warehousemen & Helpers Local 949, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization.

WE WILL NOT make statements which imply that we are keeping track of your activities on behalf of Local 949, or any other labor organization.

WE WILL NOT deny access to our premises to agents of Local 949 who seek admittance for the purpose of representing you so long as Local 949 remains your collective-bargaining representative and we are legally obliged to give effect to certain terms of the expired collective-bargaining agreement with Local 949, including the provision providing for access to our premises by the Union's officials.

WE WILL NOT cause the arrest of any official of Local 949 who is on our premises under the provisions of the expired agreement with the Union for the purpose of providing you with representation so long as the officials make arrangements with us to enter our property as provided in our letter to Local 949 on November 20, 1979.

WE WILL NOT unilaterally alter the terms under which officials of Local 949 may enter our premises to represent you from those which existed under the expired collective-bargaining agreement with the Union without first providing the Union with an opportunity to bargain concerning such a change, and, if the Union chooses to bargain, we will maintain the existing provision in effect until an agreement is reached upon a change or an impasse is reached in our bargaining over any proposed change.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you if you choose to exercise the rights you have under the National Labor Relations Act, or refuse to bargain with Local 949 as required by the Act so long as it remains your representative.

WE WILL rescind the restrictions which we placed on the access by officials of Local 949 to our premises on December 13 and 14, 1979.

GREAT WESTERN COCA-COLA BOTTLING COMPANY, D/B/A HOUSTON COCA-COLA BOTTLING COMPANY.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge: This matter was heard by me in Houston, Texas, on five hearing days between May 15 and 30, 1980, pursuant to a consolidated complaint issued on behalf of the General Counsel by the Regional Director for Region 23 in the above-captioned unfair labor practice cases and an order directing hearing, order consolidating cases, and notice of hearing issued by the Regional Director for Region 23, on April 30, 1980, in the above-captioned representation case.

The consolidated case is based on charges filed by Sales Drivers, Deliverymen, Warehousemen & Helpers Local 949, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein called the Union), in Case 23-CA-7744 on November 20, 1979, and Case 23-CA-7760 on December 20, 1979, as amended December 27, 1979.[1] The issue in the unfair labor practice cases were joined by the answer of Great Western Coca-Cola Bottling Company d/b/a Houston Coca-Cola Bottling Company (herein called Respondent) filed on or about February 14, 1980.

The petition instituting the representation matter was filed by Michael C. Neel, attorney (Petitioner), on September 27, 1979. It seeks to decertify the Union which had theretofore been certified as the exclusive collective-bargaining representative for an appropriate unit of the Respondent's employees on May 31, 1978. The parties entered into a Stipulation for Certification Upon Consent Election which was approved by the Acting Regional Director for Region 23, on March 6, 1980. Pursuant to that stipulation, a secret-ballot election was conducted on April 17, 1980, following which an official tally of ballots was issued reflecting that there were approximately

[1] Hereafter those dates bearing no calendar year refer to 1979.

555 eligible voters, that 232 votes were cast for the Union, 257 votes were cast against the participating labor organization, 30 ballots were challenged, and 1 ballot was void. At the conclusion of the election, the outstanding challenged ballots were sufficient to affect the outcome of the election.

On April 22, 1980, the Union filed objections to conduct affecting the results of the election, which included, *inter alia* , allegations that Respondent's conduct alleged to be unlawful in Cases 23-CA-7744 and 23-CA-7760 interfered with the election. In the aforementioned order directing hearing, order consolidating cases, and notice of hearing, the issues raised by the challenged ballots and certain of the Union's objections were consolidated for hearing, ruling, and decision by the Administrative Law Judge, and it was further ordered that Case 23-RD-444 be thereafter transferred to and continued before the Board pursuant to the provisions of Sections 102.46 and 102.69 of the Board's Rules and Regulations, Series 8, as amended. On May 12, 1980, parties in the representation matter entered into a stipulation approved by the Regional Director for Region 23 wherein it was agreed that the challenged ballots of certain employees could be opened and counted forthwith. On the same date the Union withdrew those objections which did not involve the same issues as were involved in the above-captioned unfair labor practice cases. Following the counting of the challenged ballots as provided in the party's stipulation of May 12, 1980, a revised tally of ballots was issued. The revised tally shows that there were approximately 555 eligibles, that 233 votes were cast for the Union, that 269 votes were cast against the Union, that 1 ballot was void, that 17 challenged ballots remained undetermined, and that the number of challenged ballots no longer was sufficient to affect the results of the election. As a consequence of the foregoing, the factual questions presented by the representation case are identical with those presented in the unfair labor practice cases.

All parties were represented at the hearing by very able counsel who were afforded the opportunity to offer relevant evidence, to argue orally, and to file post-hearing briefs.[2] On the basis of the record made at the hearing, my observation of the demeanor of the witnesses, and my careful consideration of the briefs filed on behalf of all of the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the Respondent admits that it is a Tennessee corporation engaged in the business of bottling and distributing Coca-Cola and other soft drinks. The Respondent maintains its principal office and place of business in Houston, Texas, and operates various facilities in the greater Houston area. During the 12-month period preceding the issuance of the complaint, which period is representative of its operations at all material times, the Respondent purchased goods valued in excess of $50,000 from suppliers located outside the State of Texas which were shipped to its Houston area facilities directly from locations outside the State of Texas. At all times material herein, the Respondent has been an employer within the meaning of Section 2(2) of the Act, engaged in commerce or business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges and the answer admits that the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Access Dispute and the Arrest of the Union Officials*

The complaint alleges in substance that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally imposing restrictions upon the Union's right of access to the Respondent's facilities in that on and after December 11 representatives of the Union were required to meet with employees only in certain designated plant areas and, even then, union representatives had to be accompanied by officials of the Respondent, all contrary to the practice developed under the collective-bargaining agreement. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act by causing the arrest of two union officials (on the ground that they were engaged in criminal trespass) in the presence of employees on or about December 11 at its Hardy Street warehouse. The Respondent's answer denies the factual and conclusionary allegations of the complaint in this regard.

1. Chronology of events

Following the Union's selection as the collective-bargaining representative of the Respondent's employees, negotiations were commenced between the Respondent and the Union which culminated in the execution of a collective-bargaining agreement effective from November 17 through November 30, 1978. That agreement contains the following provision related to the right of union representatives to have access to the premises of the Respondent:

ARTICLE VI

* * * * *

Section 7. The Company agrees that the Union representatives may have access to the plant at reasonable times upon reasonable notice to the Company, for the purpose of investigating grievances or conducting other business pertaining to the employees covered by this Agreement. The Union repre-

[2] Subsequent to the expiration of the time allowed for the filing of briefs, the Union, by letter dated August 25, 1980, requested that I notice the decision of Administrative Law Judge Melvin J. Welles in JD-427-80 involving the Respondent and the Union. The Union argued that weight should be given to the fact that Administrative Law Judge Welles found that the Respondent violated the Act in several specific respects. No opposition was filed thereto. Accordingly, notice is accorded Administrative Law Judge Welles' decision. Notice is likewise taken of the Board's decision involving the Respondent and the Union issued August 27, 1980, reported at 251 NLRB 860, wherein the Board found the Respondent did not violate the Act as alleged in another case.

> sentative must first report to the representative designated by the Company, and shall not in any manner interfere with the job duties of any employee, or production, or operations of the Company.

The bargaining history related to this provision shows that the Union's initial proposal with respect to the subject of access was much broader than the foregoing provision and the Respondent's initial proposal was significantly more restricted than the foregoing proposal.[3] On the basis of the record before me, it is fair to conclude that the above-quoted provision was agreed upon as a compromise. Indeed, the Respondent even elicited testimony to this effect.

There is no evidence that the meaning and application of the foregoing provision was ever a matter of serious contention between the parties to the agreement until the final month in the term of the agreement. Union representative Ronald Teague testified that he probably visited the premises of the Respondent 25 to 50 times prior to November when the dispute erupted. The Respondent vigorously disputed Teague's assertion in this regard through the testimony of numerous witnesses. The paucity of detail in Teague's testimony concerning his activities during his alleged visits together with the lack of any independent corroboration, when considered against the Respondent's evidence which shows that under its usual operating procedures numerous visits by Teague would not (as they apparently did) go unnoticed, convices me that Teague's assertion as to the number of his visits prior to November is greatly exaggerated. On the contrary, I am convinced that Teague's visits were limited to three or four undisputed instances when he went to the Respondent's premises to meet with officials of the Respondent and perhaps the single incident when he visited the premises of the Respondent's Gulfgate facility in an effort to locate a damaged vehicle in connection with a potential grievance concerning employee Colunga. Hence, it is my finding that no significant practice or procedure had developed concerning access to the Respondent's facilities prior to November.

As noted, the decertification petition was filed by attorney Neel on September 27. It appears that the initial processing of this petition was delayed by the pendency of certain unfair labor practice charges. However, by early November it is apparent that Teague had become convinced, at least in his own mind, that the petition would ultimately result in an election among the Respondent's employees and that such an eventuality would require more time than he personally had available.[4] As the result of the situation developing among the Respondent's employees, Teague employed Guadalupe Vasquez (known as Lupe) to assist him through this period.[5] In his testimony, Vasquez acknowledged that he was probably employed by the Respondent because of the decertification petition filed by Neel. In addition, in the course of his testimony, Teague acknowledged repeatedly that among the purposes of Vasquez' visits to the Respondent's facilities in November and December, detailed more fully below, was to answer questions the Respondent's employees might have about the decertification petition. Although some evidence supports the conclusion that the *sole* purpose of the Union's efforts to gain access to the Respondent's premises after November 14 was to campaign in anticipation of the decertification election, such a conclusion would be unwarranted where, as here, other unrebutted evidence indicates that Vasquez' activities included efforts to ascertain employee desires concerning their priorities in a new collective-bargaining agreement and to observe in-plant working conditions. Against this background the access dispute began to unfold.

Following his employment in early November, Vasquez was introduced by Teague to Mitchell Ferguson, the Respondent's director of personnel, as a representative of the Union who would be engaged in representing the Respondent's employees. Thereafter, on November 12 and 13 Vasquez made several attempts to reach Jerry Nelson, the Respondent's vice president for corporate relations, and Ferguson in order to gain access to the Respondent's main plant on Bissonnett Street in Houston. Vasquez testified that, although he was unsuccessful in contacting either man after several attempts, the secretary at the Union's office was later successful in contacting Ferguson and arranging for Vasquez to visit the Bissonnett Street plant at 7 a.m. on November 14.

When Vasquez arrived at the Bissonnett plant at the appointed time on November 14, he was intercepted by the plant guard who told him that he had been instructed to tell Vasquez to report to the office.[6] Vasquez proceeded to comply with this instruction by driving his automobile from the employee parking lot at the side of the building to the front of the building where there is a visitor's parking slot. Thereafter, Vasquez entered the building and went to the personnel office where he met with Ferguson. Upon arriving in Ferguson's office, Vasquez was asked, "What's the purpose of you being here?" Vasquez responded that he thought that had been

[3] The Union's initial proposal provided as follows on access:

> Authorized agents of the Union shall have access to the Employer's establishments during working hours for the purpose of adjusting disputes, investigating working conditions, and ascertaining that the Agreement is being adhered to.

The Respondent's initial proposal provided:

> *Section 7.* A duly authorized representative of the Union shall be admitted to the Company's premises, at his own risk, for the purpose of ascertaining whether this Agreement is being properly observed. Such visits shall not be permitted to interfere with, hamper or obstruct normal operations. The Company shall not be liable for any time lost by employees during such visit. The Company shall receive notice in writing of any such visits at least one (1) day in advance and, upon the Company's request, the Union representative shall state the purpose and nature of his visit and he may be accompanied by a representative of the Company if it so desires, on any visit onto the premises.

[4] As sectretary-treasurer of the Union, Teague was its only full-time official. The Union serves as the collective-bargaining agent for numerous other units.

[5] Vasquez had been employed on a temporary basis on a number of prior occasions by the Union and its sister locals during organizational campaigns including the Union's campaign to become the certified representative of the Respndent's employees.

[6] For the most part, I have relied on Vasquez' account of his visits to the Respondent's premises. As between Vasquez and Ferguson, who testified concerning some visits, Vasquez, while testifying, impressed me as having a much clearer recollection of these events.

straightened out the previous day but Ferguson deflected that response by asking, "Well, I understand you want to come inside the plant. For what reason?" Vasquez told Ferguson that one of the reasons was that the Union had been contacted during the previous week by some employees who had asked about the handling of the Thanksgiving holidays and the manner in which they would be paid for this holiday. According to Vasquez, the two gentlemen then engaged in a colloquy about what the collective-bargaining agreement's requirements were in order for a union representative to have access to the plant. Ferguson—according to Vasquez—took the position that Vasquez had to signify that he had a specific grievance which required that he visit with a specific employee. Vasquez steadfastly refused to explain any reason for his visit other than his general explanation related to the Thanksgiving holiday. Apparently seeing that Ferguson was unimpressed with that, Vasquez modified his request by asking to be admitted to the break room where he could wait for employees until they visited that area during break periods. Ferguson balked at that notion but did offer to bring any employee Vasquez specified to the break room to visit with him. During the course of their exchange at this time, Nelson entered the room and Ferguson introduced the two men. Ferguson explained to Nelson that he had advised Vasquez that he would not be permitted to enter the plant unless he identified the specific grievance he sought to investigate and the specific individual he desired to see. Nelson also requested that Vasquez be specific about his business and Vasquez continued to decline to identify his purpose other than that it concerned the upcoming holiday. Nelson proceeded to explain the manner in which the holiday vacation time and the holiday pay would be handled and, when he concluded, Vasquez requested admittance to the plant area to inform the employees who had been calling the Union of Nelson's explanation. Nelson declined that request but offered to bring any particular employee to him if Vasquez would specify the individual or individuals he wanted to see. Vasquez declined that offer. Nelson then offered to post or circulate a notice with this information but Vasquez continued to insist that he be permitted to explain the matter to the employees. The exchange between Vasquez and Nelson thereafter involved basically each man's attempt to justify his position on the basis of specific language in the collective-bargaining agreement concerning plant access. Neither man made any progress in convincing the other of the merit of his respective position and Nelson finally left the office. Vasquez then turned to Ferguson and said, "Well, are you sure I can't go in?" Ferguson refused admittance again explaining that he was "just following orders." Vasquez inquired as to whose orders Ferguson was following and Ferguson identified Larry Clinton, the Respondent's counsel, as the source. Vasquez then left and returned to the Union's office where he reported his unsuccessful efforts of the morning to the office secretary.

Later that same day, Teague had three telephone conversations with Respondent's representatives in an effort to secure Vasquez' admittance to the plant. The first conversation was between Teague and Ferguson and it served little more than to identify the fact that the Respondent's managers were acting on the advice of Clinton. Subsequently, Teague talked to Clinton and it became clear that the Respondent rejected the Union's claim that it could—after notifying a representative of the Respondent—gain unlimited access to the Respondent's premises. The parameters of the dispute are contained in the following exchange between Teague and Clinton:[7]

> Clinton: What section are you talking about?
>
> Teague: Section 7. Page 8 of the Contract. Section 7 of Article 6.
>
> Clinton: I thought it was Section 7 of Article 6. It says conducting other business pertaining to the employees covered by this agreement.
>
> Teague: That's right.
>
> Clinton: What is your view about that. In other words is it your view that coming out there talking about the decertification election is conducting other business pertaining to the employees.
>
> Teague: If they have question to ask about it we will certainly answer them out there, we are out there to talk about any problems, holidays was one of them, talking about problems of maintainance on the line anything that we have any question about, we may just want to go out there to see if the Company is living up to the Agreement sometimes somebody will call up and say Hey we've got a problem, we don't know if there is a grievance or not and if there is not a grievance we'll tell them at that time, if we think we have got a grievance we will instruct them to go ahead and pursue at that point.
>
> Clinton: Well Ron if your coming. . . .
>
> Teague: It says other business.
>
> Clinton: If the purpose is to come out there to administer the contract there isen't any problem about access if the problem is to come out there and conduct a limited Union meeting we are just not going to permit it.
>
> Teague: We are not going to conduct a limited meeting or anything else but if on the lunch hour and the break on those employees time and they want to talk to us about anything we've got a right to talk to them about anything and we are not required under the contract or any law that I know of to clarify through the Company what the Union's business is going to be out there, we may be talking to them about anything under the sun and we've got a right to do it as long as we are not interfering with the Company's production and we are not going to do that and I have been out there before and I have done this without any obstruction from the Company at all and I think that the Company is trying to deny it because of the decert election.
>
> Clinton: No we are not doing it we just don't want you to come out and there and to use us as a

[7] Teague recorded the three conversations and some later conversations. The transcriptions of these recorded conversations were offered in evidence by the Respondent and admitted. The portions appearing in this decision have not been edited for typographical errors.

spring board for conducting your Union meetings and frankly thats what we thought you had in mind and the reason for that is that this morning the fellow said he had some sort of a grievance and they said well fine, tell us who it is involved and we will get him on up here.

Teague: But that was wrong the Company didn't even have a right to do that.

Clinton: Certainly we have a right to do that.

Teague: No you don't have a right to require him to tell you what the grievance is about until such time as we request a meeting with you.

Clinton: All we want to know is the name of the man, that had the grievance.

Teague: I understand that but at that time though if we wanted to bring it to the Company's attention and process it that far we'll do it but you don't have a right to ask him what grievance it is or who is involved or anything, we might withdraw.

Clinton: Why certainly we do.

At the conclusion of their conversation, Clinton promised to get back with Teague about authorizing Vasquez to visit the Bissonnett premises. Subsequently, Ferguson telephoned Teague and Teague was informed that union representatives would be admitted to the snackbar area to talk with employees during their breaks or lunch periods but the union representatives would not be permitted to walk around the plant area indiscriminately. With that information, Teague advised Ferguson he would send Vasquez back to the the Bissonnett plant but that he also intended to file a charge with the NLRB. In addition, by letter dated November 20, Clinton outlined for Teague the Respondent's position with respect to its interpretation of article VI, section 7. Specifically, Clinton's letter provided: (1) If a visit to the Respondent's premises requires that the union representative visit any part of a plant or warehouse, the Union must give a reasonable notice and be accompanied on such visits by a designated official of the Respondent as the Respondent does not permit any unescorted visits to its premises by any person and did not intend to begin such a practice at that time; (2) for the purpose of notifying the Respondent during business hours, 8 a.m. to 5 p.m., five persons were specified who could be contacted in order for the Union to give notice to the Respondent of its intention to visit its premises; (3) if an emergency arose whereby notice during the regular business hours was impractical, the Union was provided with a telephone number where Nelson could be reached after hours in order that the nature of the emergency could be described and the location of the visit could be arranged; (4) although the Respondent believed that it ought to be able to assure itself of the legitimacy of the visit, if the Union did not desire to state with any specificity the nature of its business, the Respondent would supply a meeting location at each plant and employees could be notified by either the Respondent or the Union to appear at this location at an appointed time; and (5) in the event it became necessary for the union representative to inspect any area outside the designated location provided for the Union to meet with employees, the Company reserved the right to have officials accompany the union representatives. In essence, the parties lived within the confines of the procedures outlined in Clinton's letter until December 11, but the events between November 14 and December 11, described below, clearly indicate that the parties to the agreement were only abiding by an uneasy truce.

After Teague's intervention, Vasquez returned to the Bissonnett plant a second time on November 14. He parked in the same visitors location as before and entered the building where he was escorted by Don Claussen, a personnel assistant to the break room. When the two gentlemen arrived at the break room, it was occupied by numerous employees and supervisors. Vasquez testified that he took up a position at one of the tables and removed some papers from his briefcase which pertained to a survey the Union was conducting of employees with regard to contract proposals under consideration. Claussen seated himself next to Vasquez. According to Vasquez, several employees approached him but appeared reticent to talk with him. After about 15 minutes, an individual whom Vasquez knew only as Mr. Sleiger walked into the break room, approached him, and asked in a loud voice, "What the hell are you doing here?"[8] When Vasquez explained his position with the Union, this individual told him, again in a loud voice, "Well, you have no goddamned permission to be here." Vasquez disputed Sleiger's statement and referred him to Claussen who confirmed that Vasquez' presence had been approved. Shortly thereafter, Vasquez asked Claussen if he intended to be present during the whole time he was in the break room and Claussen told Vasquez that he was instructed to do just that. Vasquez protested, saying he could not conduct his business in Claussen's presence, and asked to make arrangements to go to the Respondent's Gulfgate warehouse. In response to this request, Claussen left the room for approximately 10 or 15 minutes and returned to report that he was unable to locate anyone who had authority to act upon Vasquez' request.[9] When Vasquez began again to protest Claussen's presence, Claussen merely reiterated that he was instructed to remain with Vasquez at all times. However, at approximately this time, Nelson entered the break room and Vasquez began to protest to Nelson about Claussen's presence but Nelson cut him short by saying that he was taking Claussen with him. According to Vasquez, after the two men left, three or four supervisors and some employees remained in the room. Approximately 15 minutes later, however, Nelson returned and asked Vasquez where he was parked. When Vasquez told Nelson that he was parked in the spot adjacent to the lot reserved for the personnel office, Nelson told Vasquez, "Well, I don't want you to park there anymore. I want you to park across the street." After issuing this instruction, Nelson left but about every 10 or 15 minutes thereafter Claussen returned to ask Vasquez if he was finished and if he was ready to leave.

[8] In a telephone conversation with Teague on December 13 Ferguson referred to an individual with a similar name as one of his superiors.

[9] Claussen was subsequently named in Clinton's November 20 letter as one of the Respondent's officials through whom the Union could schedule visits.

When Vasquez indicated to Claussen that he was ready to leave, Claussen informed Vasquez that Nelson wanted to visit with him in his office. Thereupon, the two men proceeded to Nelson's office where Nelson once again asserted that Vasquez should not be permitted to have access unless he could identify a specific grievance or a specific employee whom he desired to visit. This assertion on Nelson's part ignited the prior disagreement the gentlemen had had earlier in the day over the meaning of the language of article VI, section 7, of the contract. Finally, Nelson asserted that he wanted Vasquez to provide him with a 24-hour advance notice before the time of the desired access and Vasquez protested that the agreement said nothing about such a lengthy notice requirement. When Nelson asserted that it in fact did so provide, Vasquez read the provision to Nelson verbatim and observed that, in fact, nothing was contained in the text of that provision about a 24-hour notice. However, Nelson responded by saying, "Reasonable time to me means a 24 hour notice."[10] Relenting, Vasquez told Nelson that when possible he would give him a 24-hour notice but he expected that such occasions would be rare. Thereafter, Vasquez told Nelson he wanted to visit the night-shift employees at 1 a.m. the following morning and Nelson told Vasquez that he would have someone arrange for his admission.

When Vasquez returned early the following morning to the Bissonnett plant, he was met by a supervisor who led him to the break room and told him, "OK. Here's the break room. You know the rules you are to remain here." Upon entering the break room, Vasquez noted the presence of a mixed group of employees and supervisors eating their lunch. On this occasion Vasquez went around the room introducing himself, handing employees his business card, and telling employees that if they had any questions they should telephone him. Vasquez testified that on several occasions the supervisors would interrupt conversations he was having with employees for the purpose of assigning them work duties but there is no evidence that this activity was out of the ordinary. After the lunch break ended, the supervisor who had escorted Vasquez to the break room returned and asked Vasquez politely to leave because he had to lock the lunchroom. Vasquez complied.

Later in the day on November 15, Vasquez telephoned Ferguson seeking admittance to the Gulfgate warehouse. Responding, Ferguson told Vasquez that he could not be there that evening but the two men agreed to meet at that location at 10 o'clock the following morning. When Vasquez arrived as arranged, Ferguson supplied him with a hardhat and a visitor's badge and proceeded to escort Vasquez to the lunchroom in the upstairs portion of the warehouse where Ferguson instructed Vasquez he was to conduct his business. There was a mixed group of employees and supervisors present in the lunch room at that time. Vasquez testified that he began mingling among the employees listening to their complaints. Finally, one employee, identified only as Saucedo, complained to Vasquez about a machinery failure problem which caused employees extra work. Vasquez told Saucedo that he would have to observe the operation before he could discuss the matter with the Respondent. With that, the two men left for the warehouse floor allegedly to observe the situs of Saucedo's workplace. Enroute to that location, Ferguson observed Vasquez was out of the lunchroom and, in the presence of some assembled employees, asked Vasquez, "What the hell are you doing here?" Vasquez told Ferguson that an employee had brought a specific grievance to his attention and he wanted to observe the problem. In a loud voice, apparently to be heard over the warehouse noise, Ferguson told Vasquez, "You know, you aren't supposed to be here. Goddamn it, Lupe, you ain't supposed to be in this area." Ferguson and Vasquez continued to talk about whether Vasquez would be permitted to continue on to Saucedo's work area and finally Ferguson told Vasquez that if he intended to go to that area he (Ferguson) intended to accompany him. Vasquez did not object, so the two men then proceeded to Saucedo's work area. Upon arriving there, Vasquez asked why the men weren't doing anything and Ferguson told him they were having a little break. When Vasquez expressed surprise about a break immediately after the lunch break, Ferguson told him the employees were permitted to have other little breaks. For the next 15 or 20 minutes, Ferguson explained the operation of the equipment in that area and interjected remarks from time to time to the effect that Vasquez was not supposed to be there. In addition, Ferguson insisted that Vasquez should have advised him on the previous day that he wanted to visit the plant area. Following their conversation on the plant floor, Vasquez returned to the break room. After remaining in the break room for 5 to 10 more minutes, Vasquez started to leave and at this point Ferguson asked him, "Where the hell are you going now?" Vasquez explained that he was leaving the premises.

On November 27 and 28, Vasquez attempted to contact both Ferguson and Nelson. He testified that he was unsuccessful throughout the day on November 27 but finally reached Nelson on November 28 at which time he sought access to one of the Respondent's facilities. Nelson inquired of Vasquez if he had read Clinton's letter of November 20. When Vasquez admitted his ignorance of the letter, Nelson told him that he did not want him coming back onto the Respondent's premises until he had reviewed the letter. Later that day or the following day, Vasquez went to the Union's offices and read the letter. Thereafter, he attempted to reach one of the officials named in the letter in an effort to gain access but was unsuccessful in contacting any of the five individuals listed therein. Subsequently, Vasquez was successful in contacting Ferguson and requested access to the Respondent's Southport warehouse that particular day. Ferguson told Vasquez that he was unable to accommodate his request because of some other unspecified matters on his schedule but he made arrangements to meet Vasquez at the warehouse on the following day. There is no evidence that any untoward incidents occurred on this visit.

[10] Although the Respondent's initial contract proposal on access provided for a 24-hour advance written notice, this provision was dropped from the final agreement. Nelson's bargaining notes reflect that he was specifically aware of the final language agreed upon.

Subsequently, on December 4, Vasquez sought access to the Channel view warehouse. Upon contacting Ferguson, Vasquez was informed that he and all other individuals named in Clinton's November 20 letter were unavailable to accommodate this request. As a consequence, Vasquez asked to visit the Southport warehouse the following Monday and it appears that such an arrangement was agreed upon. When Vasquez arrived at the Southport warehouse at the arranged time, he attempted to park in the employee lot but he was advised by the security guard that he (the guard) had been instructed by his superiors to advise Vasquez to park across the street. After entering the Southport warehouse, Vasquez was met by Claussen who advised him that he would lead him to the lunchroom and that he was to remain there. Vasquez remained in the lunchroom for approximately 2-1/2 hours that day and, while there, he requested permission of Claussen to visit other warehouses that afternoon or the following morning. Claussen informed Vasquez—contrary to Clinton's November 20 letter—that he would have to make his appointments through either Nelson or Ferguson as he was not vested with authority to make such arrangements.

Elbert Hill, the night supervisor at the Respondent's Hardy Street warehouse, testified that on December 10 he attended a supervisors' meeting at the Southport complex. At this time Hill was given sufficient copies of a letter signed by the Respondent's president, Robert Hannegan, to distribute to all employees which he did later that same day. Hill testified that the supervisors were instructed that they were not to attempt to interpret the letter for the employees. The body of the letter reads as follows:[11]

> I know that each of you are concerned with the many rumors being heard about the Teamsters Union and your Company's relationship with them.
>
> We would like to tell you the true facts as we know them today so that you will have a clear understanding of what is happening.
>
> Over 30% of our employees signed a petition and submitted it to the National Labor Relations Board requesting them to hold a secret ballot election to determine if a majority of our employees still want to be represented by this Union. Obviously these employees felt that the Union was not helping them and resented being asked to pay the union dues. The Teamsters Union, using legal technicalities as an excuse, have refused to agree to have the Labor Board hold an election. We think this Union is afraid to have an election because they know they will lose.
>
> As you know, our present union contract expired on November 30, 1979. We have refused to negotiate a new contract because our lawyers have advised us that it is not legal to negotiate until an election is held.
>
> Even though the contract has expired we will continue all of your present benefits. These benefits are the same for all employees, regardless of their position in the Company. We cannot, however, now make any changes in your present benefits or wages.
>
> One of America's most important freedoms is freedom of choice. Talk to the Union Representatives, if you know who they are. Tell them you think we should have an immediate election so that the majority of our employees can decide if this Union is needed.

On December 11, Charles Bailey, an employee at the Hardy Street warehouse who testified that when he was hired he was told that employees were reviewed each June and given pay raises if merited, telephoned the Union's office and read the text of Hannegan's letter to the Union's office clerical employee. Bailey also made a request to have a union representative come out to the Hardy Street plant to talk to the employees about the letter. Sometime prior to 3 p.m. when Bailey reported for work, Vasquez telephoned Bailey at home and told him that he would come to the Hardy Street warehouse to talk to the employees as Bailey had requested. To insure that Vasquez would have the opportunity to talk with all of the employees, Bailey explained that the part-time employees took their lunch break at 6 p.m. and the full-time employees took their break at 8 p.m.

Thereafter, Vasquez telephoned Ferguson to arrange a visit that evening at the Hardy Street warehouse.[12] Ferguson declined to accommodate Vasquez because, according to Vasquez, he had choir practice that evening.[13] When Vasquez reported this to Teague, Teague telephoned Ferguson to press the specific request to visit Hardy Street that evening. According to the transcription of that conversation, the exchange between the two men after the introductory salutations went as follows insofar as is pertinent:

> Teague: Hey listen Lupe wanted to get out to Hardy Street tonight whats . . . .
> Ferguson: Can't do it tonight.
> Teague: Why?
> Ferguson: Just can't.
> Teague: Who can't?
> Ferguson: No one here can.
> Teague: Well there will be someone out at Hardy Street won't there.
> Ferguson: Well thats not the question.
> Teague: Well its my question, will there be someone out at Hardy Street?

[11] In its brief, the Petitioner characterizes Hannegan's letter as essentially campaign propaganda. Although certain aspects of this letter bear out the Petitioner's contention, the fourth and fifth paragraphs are clearly announcements related to the Respondent's policy on the expired collective- bargaining agreement and, hence, closely related to wages, hours, and working conditions.

[12] It appears that this conversation occurred sometime prior to 3:30 p.m. Originally, Vasquez had intended to arrange access to other locations for the following day and sought access to Hardy Street that evening only because of Bailey's call.

[13] Ferguson denied that he gave Vasquez the excuse about choir practice. However, Ferguson's nonresponsive answer when questioned why he was not available that evening in the course of a conversation with Teague as quoted, *infra*, convinces me to credit Vasquez as to this point.

Ferguson: Yes but if either Mr. Clauson or I are not there you will not be allowed to get on the premises, that's the way we have been operating Ron and that's the way we are going to continue to do that.

Teague: How will we not be allowed to be on the Company premises?

Ferguson: Did you get the letter

Teague: I got the letter, but what do you mean we will not be allowed on Company premises.

Ferguson: Just what it says.

Teague: Well what does that mean?

Ferguson: What did it say, you won't be allowed on Company . . . .

Teague: Well I've already answered that I just told them we are no longer going to go by those rules because when you are not available it makes it inconvenient for us, you could notify the guy at Hardy Street we are coming.

Ferguson: We don't choose to do that apparently as far as I have been instructed.

Subsequently, Ferguson consulted with Nelson, his superior, and thereafter Nelson telephoned Teague. The pertinent substance of their conversation, according to the transcription, went as follows:

Nelson: You said you wanted to go to Hardy St. tonight?

Teague: Yes.

* * * * *

Nelson: Well its kind of late notice, we are not going to be able to provide you. . . .

Teague: No you don't understand Jerry the contract did not say how much notice we have to give only that we notify you that we are going.

Nelson: Well can you tell me who the grievance is on.

Teague: Yes I could but I don't intend to.

Nelson: O.K. well we'll have to do it some other time then.

Teague: Well we are going to be there and we just want to know if we are going to have any problem.

Nelson: Well you may yes, we are not going to let you on the property.

Teague: How are you going to restrain us from access to the property.

Nelson: I don't think I need to tell you that.

Teague: Well are you going to have us arrested?

Nelson: I'm not going to tell you that.

* * * * *

Nelson: I would be glad to go out there with you tonight to be with you, if you thought it was some kind of emergency.

Teague: But you don't even have to be there, it doesn't even say that we will be accompanied by a . . . .

Nelson: Yes but thats our position.

Teague: Well alright but thats not ours, what I am saying is that we are going go there *if you feel like under your instructions that you've got to watch what we've got to do thats your choice but Mitch is telling us that we can't get there because he's got to go to choir practice, now although I can appreciate that, that doesn't have anything to do with our business.*

Nelson: Now that is not the position, the position of the company is that we are going to have a representative here there with you and we can't do it tonight and . . . .

Teague: Well the supervisor is on duty out there isen't he?

Nelson: Unless its an emergency we can do it tomorrow.

Teague: There's no emergency other than general business that comes up on the first shift, that would come up on the second shift or anybody else.

* * * * *

Nelson: Well we won't be able to meet you there tonight.

Teague: Alright we are trying to avoid now any conflict with you, the police or anybody else, if you are going to have us arrested I would like to know now and if not then we are going to go out there and conduct our business.

Nelson: I don't know if there will be an arrest or what will happen, it depends on what you are going to do.

Teague: We are not going to do nothing more than what we would do on any other business.

Nelson: Well Ron we are just not going to allow you to go out there tonight.

Teague: We're going out there what you mean is that you are not going to let us have access to the property.

Nelson: Unless you have got some kind of emergency.

Teague: Well I'm telling you we have some people we want to talk to about some problems that we need to investigate and we don't intend, we may just want to see how they are doing make sure the company is living under the contract.

Nelson: I can assure you we are.

Teague: Alright but I don't need your assurence, I need to know myself, I'm sure that you would assure me that all the time, now what I'm saying is that we want to avoid any problems.

Nelson: Oh I do to, I want to avoid problems.

Teague: But what I am saying is though that we are going.

Nelson: I think we are reasonable by saying that you don't need to go today.

Teague: But you don't know what our needs are though Jerry.

Nelson: Well no because you are not telling me.

* * * * *

Teague: O.K. but we are going out there, now are you going to have us arrested.

Nelson: I don't know.

Teague: Well I guess we'll just have to find out won't we?

Nelson: I guess.

Teague: O.K. [Emphasis supplied.]

Following the Teague-Nelson conversation, the Respondent's officials made a determination to cause the arrest of any union officials who attempted to enter the Hardy Street premises that evening. According to Hill, instructions in this regard were transmitted to him by approximately 5 p.m. Arrangements were also made to post a security guard at the Hardy Street warehouse that evening even though a guard is not normally present on the premises at such times. No attempt was made to notify the Union's officials that the warehouse supervisor was under instructions to cause the arrest of any union official who appeared on the premises and refused to leave.

Notwithstanding the position of the Respondent's officials, Teague decided to go to the Hardy Street premises that evening. Accordingly, at approximately 6:30 p.m. Teague and Vasquez arrived at the Hardy Street warehouse. As they proceeded to enter the warehouse, they were stopped by the guard and asked at least to identify themselves. They did so. After the two men identified themselves, the guard proceeded into the office at the warehouse to report their presence and Teague and Vasquez proceeded into the warehouse where Teague approached Bailey and asked for the letter he had called the Union about. Thereafter, it appears that Teague proceeded to the office where he identified himself to Hill and told Hill that he intended to look around the warehouse. Hill claims to have advised Teague that his presence was unauthorized and requested that he leave. Hill's testimony discloses that Teague responded by saying that he had a right to be present in the warehouse and that he told Hill to go ahead and make the phone calls he had to make as he would be finished by the time Hill had completed the calls. With this, Teague headed toward the warehouse area and Hill called, among others, the sheriff's office. Deputies were dispatched to the scene. When deputies from the sheriff's office arrived, Teague and Vasquez asserted to them that the collective-bargaining agreement gave them the right to be present but they were nevertheless arrested at Hill's insistence and taken to a booking station in the sheriff's vehicles. All witnesses agree that numerous night-shift employees witnessed the arrests. The security guard's report and testimony discloses that, to the extent possible, he followed Teague and Vasquez through the premises until the police arrived.[14] The guard's irregularity report states, "[t]hey walked around and through the plant checking things such as the merchandise, floor conditions, fire extinguishers, building material and trucks. They would speak to employees along the way and ask such questions as 'How are you doing,' 'Are the working conditions always this way' [referring to some humidity, soda, and slippery matter on the floor]." Shortly after Teague and Vasquez had been removed from the premises, Nelson arrived at the Hardy Street warehouse and solicited statements from employees concerning work disruptions which occurred by the presence of Teague and Vasquez. The statements in evidence disclose that only a minimal, if any, disruption occurred.[15] At approximately midnight, Teague and Vasquez were released on bail and returned to the premises to retrieve their vehicles. Both men were prosecuted in February 1980 for criminal trespass as a result of this incident but they were found not guilty.

On December 13, Ferguson telephoned Teague and, according to the transcription, advised him as follows:

> . . . when you ask to go to a particular location that if you have a specific grievance or business under the contract and you are willing to tell us what that reason is that we will be happy to provide you acess [sic] to the property if you do not do so when we will deny you acess [sic] to the property.

The long colloquy which followed made it plain that there was a fundamental disagreement over the meaning of the access provision to the extent that Teague believed that the Respondent had no right to follow the union agents while they were on the Respondent's premises. Ferguson was of the view that the Union must provide the Respondent with a completely satisfactory reason for visiting in order to gain admittance in the first instance.

Thereafter, by letter dated Decemer 14, Clinton advised the Union of an even more restrictive policy on the ground that the Union had abused the access provision by engaging in campaign activities, harassing employees, interfering with production, violating safety rules by wandering through production areas without protective safety equipment, cursing the Respondent's representatives, and engaging in "inexcusable" actions on December 11. Accordingly, Clinton advised Teague as follows:

> Because of the Union's actions, the Company has no choice but to limit the Union's access to instances of specific complaints or grievances signed by employees and presented in writing by the Union to the Company. The Company will continue to expect reasonable notice, and will accompany any Union representative to one of the areas designated in our letter of November 20, 1979. The Union's notice of a desire to visit should be provided to those Company representatives as set forth in the writer's November 20, 1979, letter to you. In the future no representative of your Union will be permitted access to any Company facility merely by stating that he wishes to conduct unspecified "Union business" or by making some vague claim that he wishes to check on some condition that he speculates may exist (as was the case when you de-

[14] The security guard is employed by an independent contractor.

[15] In this regard, the disruptions were clearly much less significant than would have occurred under the procedures outlined in Clinton's November 20 letter. Moreover, it is clear from the descriptions in this record that the presence of the deputies probably caused a significantly greater disruption of production.

manded access to the Glenbrook facility yesterday). Whenever you or any other representatives of your Union wish to speak to any Company employee, a Company representative will either bring that employee to the Union representative during the employee's break or you or your Union representative may make prior arrangements for the employee to meet in the designated area during the break. The Company does not intend to tolerate further episodes of any Union representative wandering through any of the Company's facilities and stopping employees who have not requested to see a Union representative from performing their duties.

2. The contentions

The General Counsel and the Union contend in their briefs that commencing in mid-November the Respondent unilaterally altered the parties' agreement with respect to the Union's right of access as provided in the collective-bargaining agreement. They further contend that as a direct result of the more restrictive right of access Teague and Vasquez were arrested on December 11 when they persisted entering the Hardy Street warehouse in accord with the access practice developed under the agreement. The Union contends that at no time did it abuse the access provision and, consequently, the Respondent had no demonstrable reason or interest in screening its visitations. Neither the General Counsel nor the Union appear to perceive any significance flowing from the fact that the decertification petition was pending or that the Union, through Teague, asserted on more than one occasion that one of the purposes for desiring access was to answer questions about the decertification petition.

Among other arguments, the Respondent contends that there was never a practice established whereby union representatives were permitted to visit its premises unaccompanied.[16] Assuming that the union representatives did routinely visit the premises unaccompanied, the Respondent contends that there was no violation as the changes it made in November and December were insignificant. The Petitioner makes a similar contention. The Respondent and the Petitioner also contend that the Respondent was privileged to unilaterally restrict access for the asserted purpose of discussing the decertification petition with employees. Finally, the Petitioner asserts that the events of December 11 are not cognizable within the framework of the collective-bargaining agreement because by that time it had expired.

3. Additional findings and conclusions

The cases dealing with access to an employer's premises by nonemployee union agents produce varying results depending upon the purpose for which access is sought. Thus, an employer is permitted to deny access to nonemployees to engage in organizational activities absent special conditions not relevant here. *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In the context of an organizational campaign, it was the Supreme Court's conclusion that the denial of access to outside organizers resulted in less destruction to employees' Section 7 right to learn of the benefits of organizing for collective-bargaining purposes than would occur to an employer's right to control the use of his property if access were granted to outside solicitors. In the Court's view, the other means normally available to outside organizers to reach employees were, in most instances, adequate to insure that employees could fully exercise their Section 7 rights.

Access by nonemployee union agents for the purpose of administering or policing a collective-bargaining agreement is an entirely different matter as the necessity to actually observe the work situs is often essential to the representative's ability to properly represent employees and police an agreement. Accordingly, there are cases where the right of access of a certified representative is inferred even in the absence of explicit contractual language providing for access. *Fafnir Bearing Co.*, 362 F.2d 716 (2d Cir. 1966); *Triangle Plastics, Inc.*, 191 NLRB 347 (1971). See also *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 at 438 (1967). As observed in a recent case, undue restrictions upon a union representative's access to the worksite impairs a union's ability to police its agreement and thereby diminishes employees' Section 7 rights. *Villa Avila*, 253 NLRB 76, 81 (1980). This is not to say, however, that where access is permitted an employer is without authority to institute and enforce reasonable rules necessary to safeguard its property interests.

Yet other factors are present in this case which require discussion. In the first instance, at the time the access issues arose here, the incumbent Union's continued representative status was being questioned. I am satisfied that under such circumstances the provisions of the collective-bargaining agreement cannot be used as a subterfuge either to perpetuate an incumbent union's status or to stifle supporters of the incumbent union. *N.L.R.B.* v. *Magnovox Co.*, 415 U.S. 322 (1974), citing with approval the related Board case in *Gale Products*, 142 NLRB 1246 (1963). See also *The Kelly-Springfield Tire Company*, 223 NLRB 878 (1976). At the same time, however, it must be recognized that even in the context of an attack upon its representative status by employees dissatisfied with any union representation or by a rival labor organization, an incumbent union is entitled to continue to administer its agreement. *Telautograph Corporation*, 199 NLRB 892 (1972); *Shea Chemical Corporation*, 121 NLRB 1027 (1958). Moreover, employer conduct which has the effect of creating a disparity of opportunity for competing groups to appeal for the loyality of employees in the course of a decertification campaign is prohibited. *Cherokee Sportswear, Inc.*, 178 NLRB 233 (1969). Finally, for purposes of the discussion below, I have concluded that the access provision of the collective-bargaining agreement here survived the expiration of the contract which expired on November 30. This conclusion appears compelled by the Board's decision in *Peerless Food Products,*

[16] I reject without further discussion the Respondent's contention that the broad management-rights clause and its common law property rights permitted it to establish any access rules it desired so long as they were not specifically limited by the access provision in the collective-bargaining agreement. This argument, made in connection with its contention that it had the right to accompany union officials on its premises, ignores the bargaining history concerning the access provision.

Inc., 236 NLRB 161 (1978), that even a past practice of permitting access by nonemployee union agents for the purpose of policing an agreement rose to the level of a term of employment not subject to unilateral change. As such, an access provision of a collective-bargaining agreement must likewise be considered within the category of terms related to the employer-employee (as opposed to the employer-union) relationship which the Board regularly finds to survive the term of a contract. *Gordon Rayner, et al., d/b/a Bay Area Sealers*, 251 NLRB 89 (1980).

It is obvious that the foregoing legal principles are more easily stated than practiced and, hence, some commonsense observations are in order. Although to an employer the mere presence of a union agent on the premises acting concerned for employees' welfare during a decertification campaign might be considered tantamount to campaigning, the absence of union agents during even this period might be interpreted by employees as proof positive that the union is not doing the job for which members pay dues. That an incumbent in any political environment enjoys an advantage not available to rivals simply by doing well what the incumbent is elected to do must be recognized as inherent in the situation—as a fact of life.

It is obvious that the Union here became more attentive to the Respondent's employees following the filing of the decertification petition and much of the Respondent's actions in this case were motivated by the fact that it perceived the Union's increased attentiveness as campaigning. In an indirect sense, this is undoubtedly the case but a reading of the secuirty guard's report of Teague and Vasquez' activities (which report I regard as somewhat objective) at the Hardy Street warehouse on the evening of December 11 illustrates the type of actions engaged in that evening by the union agents. If in fact those activities are an exempler of the union agents' conduct throughout November and December, it is only in the indirect sense that it can be said that the union agents were campaigning. Indeed, absent the decertification petition, there would not be the slightest question but that Teague and Vasquez were performing normal bargaining-agent functions by such conduct. By contrast, the activities shown in *Bonnie Foods, Inc., d/b/a Don's Super Valu*, 172 NLRB 192 (1968), cited by the Respondent, represents the type of overt organizational activities an employer could permissibly prohibit. However, the evidence here fails to establish that the Union was engaged in such overt campaigning. This is especially true with respect to the December 11 events where the evidence shows that the representatives went to the Hardy Street premises as a consequence of Baily's concern over his wages in light of Hannegan's letter of December 10.

Guided by the foregoing principles, I am satisfied that, to the extent that the General Counsel's complaint concerning unilateral changes attacks the ground rules for access set forth in Clinton's November 20 letter, it lacks merit.[17] In the first instance, these allegations assume that there had been an extensive prior practice under the access provision—a fact which, as I have found above, the General Counsel failed to prove. Secondly, the General Counsel and the Union's argument seems to assume further that the Respondent had no legitimate interest in limiting the union officials' access by requiring that production area visits be escorted which, in essence, is all the November 20 letter provides. I reject that assumption especially where, as here, there is ample evidence that the Respondent maintained such a policy for *all* outside visitors. *Peerless Food Products, Inc., supra.* Moreover, where, as here, a decertification petition was pending and the Resonent was maintaining a no-solicitation/no-distribution rule, I am likewise satisfied that it was justified in insisting either upon some specific explanation of the Union's desire to visit its production area *or* upon the right to accompany union officials to production areas of its premises. Accordingly, as I believe that Clinton's November 20 letter was nothing more than a reasonable attempt to flesh out the bare bones of the contractual-access provision with detail for its implementation, I find that the evidence is insufficient to show that the Respondent thereby unlawfully altered the contractual access provision in violation of Section 8(a)(5) of the Act.

Believing as I do that Clinton's November 20 letter establishes rules which are not inconsistent with the access provision and represents a benchmark of reasonableness, the same cannot be said for the Respondent's conduct which followed.[18] Thus, between November 14 and December 11, Vasquez was chastised in front of employees even though a management representative was seated next to him, was on occasion unable to reach any of the five individuals in Clinton's letter to make arrangements to visit the premises, was instructed not to park his vehicle on the Respondent's premises, was told that reasonable notice meant 24 hours' advance notice notwithstanding that a similar provision proposed by the Respondent was dropped at the bargaining table, was pressed on occasion to conclude his business and be on his way, and was told by one official named in Clinton's letter that he, in fact, did not have the authority to make visitation appointments. Finally, when Vasquez sought admittance on December 11 pursuant to Bailey's request to discuss Hannegan's December 10 letter implying that a wage freeze would exist while the question concerning representation existed (which the Respondent's supervisors had been instructed not to explain) and chiding the Union for the anonymity of its agents, Vasquez was told by Ferguson that he could not accommodate the visit because he had choir practice that evening. Colloquially speaking, although the Union may indeed have been motivated by the decertification petition to clean up its act, the Respondent sought to give it the runaround when it did so.

[17] There is a variance in dates as to when the alleged unilateral changes occurred in the General Counsel's brief and complaint. The complaint alleges such unlawful conduct commenced December 11. The brief argues the unlawful conduct commenced in November.

[18] Although Teague belatedly objected to the November 20 ground rules and they appear (at first blush) to be inconsistent with the rationale of *Villa Avila, supra*, I am satisfied that they fit the situation here because of the production line nature of the Respondent's operations and the contractual protection against production interference in art. VI, sec. 7.

I am satisfied that insofar as the request for access on December 11 is concerned, the Union complied with Clinton's requirements in all respects and that the Union's efforts to gain access which resulted in the arrests that evening occurred only after it became clear that the negotiated access provision was—in the final analysis—totally dependent upon the personal convenience of a few of the Respondent's management officials. Thus, the December 11 request was made during normal business hours and, although Teague chose not to disclose to Nelson the purpose of his request to visit the premises, he clearly indicated that he had no objection to a representative of the Respondent accompanying him. Nevertheless, Nelson rejected this request because, allegedly, there was insufficient advance notice, nobody was available, and the Respondent chose not to permit the Hardy Street supervisor to accompany the union officials on this occasion as had been done on earlier night shift visits. Instead Nelson, who had earlier insisted upon Vasquez' strict adherence to the visitation details specified in Clinton's letter, steadfastly insisted that Teague convince him that a real emergency existed which necessitated Teague's request to visit the premises that evening when, in fact, Clinton's letter had specified that such an explanation would be required only when the request to visit was initiated after regular business hours. Whatever else may be said, the glib denial of access on December 11 by the imposition of rules inconsistent with the agreement and Clinton's November 20 letter served to reinforce Hannegan's message and deny employees the services of their representatives. Accordingly, I find the denial of access on December 11 and the causing of the arrest of Teague and Vasquez, made in furtherance of the impermissible refusal to grant access, violated Section 8(a)(1) of the Act. *Harvey's Wagon Wheel, Inc., d/b/a Harvey Resort Hotel & Harvey's Inn*, 236 NLRB 1670, 1681 (1978); see also *Southern Florida Hotel & Motel Association*, 245 NLRB 561 (1979).

As noted above, on December 13, Ferguson advised Teague that access would be limited to those occasions which the Union advised the Respondent of a specific condition it desired to look into and Clinton's December 14 letter further advised the Union that access would be permitted only on those occasions when a specific written grievance was filed beforehand. As the evidence here shows little by way of abuse of the access provision other than the Respondent's apparent belief that the Union's mere presence on its premises at all times following the filing of the decertification petition was tantamount to campaigning, I find the restrictions on access to those specific instances where the Union had prior knowledge of the condition it desired to check or had previously filed a written grievance were impermissible unilateral changes in violation of Section 8(a)(5) of the Act. *Granite City Steel Company*, 167 NLRB 310 (1967).

B. *The Discharge of Charles Bailey*

The Respondent argues that Charles Bailey was discharged for his insubordinate conduct in refusing to perform a legitimate work assignment on the evening of December 26. The General Counsel argues that the circumstances demonstrate that Bailey's assignment on this occasion was for discriminatory reasons and his discharge for not performing that assignment was in furtherance of the Respondent's discriminatory design. The complaint also alleges, and the answer denies, that a work assignment made to Bailey on or about December 18 was likewise for a discriminatory purpose. In addition, the complaint alleges two statements made to Bailey by his supervisor violated Section 8(a)(1). The Respondent denies those allegations.

1. Chronology of events

Charles Bailey, a relatively short, soft-spoken black man of very slender build, was initially employed by the Respondent in 1978. He worked primarily as a bottle sorter at the Respondent's Hardy Street warehouse. However, all employees with the exception of the porter are assigned numerous other duties generally related to the maintenance of the warehouse when they complete their regular work assignment. Bailey was no exception. Insofar as this record shows, Bailey's principal maintenance task related to scrubbing down the warehouse floors when he had completed his bottle-sorting task. Other evidence shows that on a few occasions Bailey had been assigned other incidental duties. There is no substantial evidence that Bailey was other than an adequate worker notwithstanding his size and the continuous lifting associated with his usual job as a bottle sorter. On the other hand, Bailey had in the past evidenced a certain degree of unreliability with respect to this attendance. In this latter connection, there is evidence that as late as October 1979, Bailey had been suspended for 3 days when he failed to return to work within a reasonable time after his supervisor had sent him home to get a doctor's certificate explaining his absence for the previous 2 days. Bailey's persistent testimony that he had no recollection of this suspension has caused me to have considerable doubt as to his veracity on matters which are not corroborated by other witnesses or circumstances.

Whether as a result of recent events dealing with his suspension or for other reasons, the record is clear that beginning in November 1979, Bailey's interest in the Union was awakened. Although Bailey had been a member of the Union since 1978, other evidence shows that it was not until November that he began to talk with union agents periodically, was given authorization cards by Vasquez to distribute, talked favorably to other employees about the Union, and passed out literature provided to him by the Union. This activity impressed Vasquez sufficiently to cause him to offer Bailey the steward's job at the Hardy Street warehouse in the middle part of December 1979.

Bailey's union activities did not escape Hill, his supervisor. Thus, Hill observed Bailey putting union literature on cars in the parking lot. Hill also testified that Albert Martinez, a hardy Street tow-motor operator, complained about Bailey's distribution of union literature during worktime and on this occasion Hill reminded Bailey of the Respondent's no-distribution rule. Hill also acknowledged the fact that employee Willie Jones mentioned Bailey's union activities to him in the course of a

conversation the two men had and acknowledged that Bailey had tacitly criticized Hill's handling of the arrest of Teague and Vasquez on the occasion of their December 11 visit to the Hardy Street warehouse. Moreover, Hill testified that, even before Bailey's criticism on December 11, he was aware that Bailey had sympathies for the Union.

In showing Hill's union animus, the General Counsel also demonstrated that Hill was not a reliable witness. On direct examination, Hill testified, in effect, that, when Bailey came to his office on December 11 and questioned the need to arrest Teague and Vasquez, he courteously explained to Bailey that the matter was the Respondent's business, not Bailey's, and that he was not at liberty to discuss the matter with Bailey. In response to Bailey's inquiry as to whether or not Hill knew who the two men were, Hill told Bailey that he did not and it did not make any difference because he would have had even his own mother arrested if she refused to leave the Respondent's property upon his request because he had been instructed by his superiors that no one was to come on the property without authorization. There was a further colloquy between Hill and Bailey about the most desirable method to handle such situations and thereafter the subject changed to Hannegan's letter. In this connection, Hill's direct testimony shows that he courteously explained to Bailey that he would simply have to rely on the letter itself and determine its meaning for himself. According to Hill's direct testimony, the conversation ended on a cordial note. However, subsequent to his conversation with Bailey on December 11, Hill prepared a memorandum of the evening's events which included, *inter alia*, a report of this apparently innocuous conversation with Bailey, albeit the conversation was only tangential to the events which had transpired that evening. Hill was cross-examined from his memorandum and he acknowledged reporting in this document that he told Bailey that he "didn't like the union or anything they stand for and that he wasn't going to let a bunch of blood suckers taking money away from employees every month represent him to his boss." Hence, I am satisfied that Hill, in general, bears considerable hostility toward unions.

According to Bailey, on the evening of December 17 he informed Hill that he would soon be receiving a letter indicating that Bailey had been appointed the union steward. The following evening—December 18—Bailey punched out at the usual time for his lunch break at 8 p.m. While on his lunch break, he gave Martinez some union literature and asked Martinez to read it over and return it to him. Bailey also testified that at 8:30 p.m. he punched back in and proceeded to get a broom to sweep up some broken glass in the parking lot as he had been instructed to do. After a few minutes, Hill approached him. Accompanying Hill was Bruno Infante, the checker supervisor at the Hardy Street warehouse, who served in effect as Hill's assistant. According to Bailey, Hill, at this time, asked, "Don't you know you're not supposed to talk union on the job?" When Bailey sought to inquire as to what Hill was talking about, Bailey said Hill responded, "The union don't pay your salary." Thereafter, Bailey said Hill instructed him to come with him into the warehouse. Once inside the warehouse, Hill told Bailey to get some soapy water in a bucket and to scrub an inside wall. According to Bailey, Hill told him that if he left the area he would be fired. Bailey complied and scrubbed the walls the remainder of the evening.

Undaunted, Bailey continued his activities on behalf of the Union. Among other things in this period following December 18, there is evidence that Bailey distributed authorization cards among Hardy Street employees and that Bailey came to work early on December 24 with copies of the Union's contract proposal survey form which he distributed by placing them on the automobile windshields. Bailey added a note to the documents to remind employees to return them to him when they were completed. According to Bailey, at lunch break that evening one employee known to him only as Jose told him that Hill had the document which Bailey had distributed that evening.

Following his lunch break on December 26, Bailey punched in and was proceeding to his work area for the purpose of scrubbing floors as was his usual routine. According to Bailey, Hill intercepted him and told him to get a bucket with some soapy water and go outside to scrub one of the exterior walls from one end to the other. Bailey complied. Once outside, Bailey scrubbed along the wall until he arrived at a point where one of the garage doors was located. Bailey testified that the door was "really, really filthy . . . it looked like it hadn't been scrubbed in 6 or 7 years, since the time it was there." According to Bailey's testimony, after he had finished scrubbing the door for the first time, Hill came over to inspect it by wiping his finger across the door. Noticing the dirt which remained on the door, Hill told Bailey to scrub it again. Bailey testified that he asked Hill if he could use a hose to wash the dirt off but that Hill told him there were no hoses available. Bailey testified that at that time he could see a hose lying immediately inside the warehouse on the floor but he did not argue with Hill about the hose nor did he mention the use of the hose any further that evening. According to Bailey, he scrubbed the door a total of four times that evening with the rag and soapy water available to him and after each washing Hill would wipe his finger across the door and tell him to do it again. In describing the futility of the task, Bailey testified that the whole exercise was like trying to wash a very dirty automobile without having anything to rinse it down. Finally, after Bailey had scrubbed the door four times, Hill inspected it and told him to do it again. Bailey flatly told Hill that he was not scrubbing the walls anymore that night. After confirming that Infante had heard Bailey's refusal, Hill told Bailey that he was fired and he should punch out, go home, and not talk with any of the employees in the process. Bailey testified that was precisely what he did.

The scenario painted by Hill with respect to the incidents on December 26 and the few days prior thereto varies only in detail. Thus, Hill testified that, approximately 10 minutes after he had sent Martinez to assist Bailey clean up the parking lot on December 18, Martinez came to his office with a union flyer which he said Bailey had given him only minutes earlier and wanted to

know what it was. Hill explained to Martinez that it was a union flyer and Martinez asked Hill to speak to Bailey in order to "get him to quit handing me that shit [meaning the union literature]." According to Hill, he thereafter went out to the parking lot and told Bailey that it was against the company rules to pass out literature on working time. Hill said that Bailey told him he was not aware of such a rule. Hill testified that he did not at that time assign Bailey to wash the inside walls but rather told him to finish sweeping up some larger trash in the parking lot. The inside wall washing assignment did not occur until 20 or 25 minutes later, if Hill's testimony is believed, and this occurred only after he observed Bailey taking an unauthorized break in the lunchroom with one of the tow-motor operators. When Hill confronted Bailey in the lunchroom, Bailey asserted that he had nothing left to do and it was for this reason that Hill directed Bailey to get some soapy water in a bucket and start washing the inside walls around some "leaker cases."[19]

Hill's version of the December 26 wall washing incident likewise varies from Bailey's version only in detail. According to Hill, Fidel Gutierrez, a truck gasser, finished his basic job first and Hill assigned him to wash one of the outside walls. Later, when Martinez had finished his regular duties, he was assigned to wash the same wall as Gutierrez. Bailey finished his assigned work next and was assigned to wash a different wall. Based on the testimony of Gutierrez, there is reason to believe that hoses to rinse the walls were provided for these two men while Bailey was not provided with a hose. According to Hill, Bailey returned to his office after about 30 minutes work on the outside wall and reported that he was finished. Surprised, Hill went to inspect. Although he found two-thirds of the wall satisfactorily clean, Hill said that one door was a total mess. Believing that Bailey thought Hill picked on him generally, Hill sought out Bruno Infante to get his opinion about the condition of the door and Infante's response upon observing the door was a simple expletive. Hill and Infante thereafter retrieved Bailey and Hill told Bailey to do the door again. A minor argument ensued about whether or not Bailey could adequately clean the door with just a rag and soapy water. Finally, Hill simply told Bailey that he would have to do a better job and that he should go do it. Hill testified that approximately 5 minutes later Bailey returned and again asserted that he was finished washing the door. Hill went to inspect and was accompanied by Bailey who remarked enroute that he needed a hose to get the door clean. Hill told Bailey that no hoses were available and that he could get the door adequately clean with the rag. Upon inspection, Hill told Bailey to clean the door again but Bailey asserted he was being treated like a kid and declined to do so. Hill asked Infante, who was also present, if he had heard Bailey's refusal and, after Infante indicated that he had, Hill asked Bailey pointedly if he was going to scrub the walls or not. When Bailey refused again, Hill informed Bailey that he was termianted, that he should punch out and that he should leave the building within 5 minutes. Hill and Infante then returned to the warehouse office. After a short period, it came to Hill's attention that Bailey had not left the building and he went to look for him. According to Hill, he found Bailey still near the door and he asked Bailey again if he was going to wash the door. Again Bailey declined Hill's request. Hill then repeated his instruction to Bailey to punch out and leave. Bailey complied.

[19] Leakers are damaged cans of soda, some of which are leaking.

2. Additional findings and conclusions

There is ample reason to be skeptical of the testimony of both Bailey and Hill. However, the General Counsel bears the burden of proving his complaint allegations by a preponderance of the credible evidence. In my judgment, the General Counsel has not done so with respect to Bailey's discharge.

The uncontradicted testimony shows that Bailey was only one of three employees assigned to wash walls on the evening of December 26. Although it may be true that the other two workers utilized a hose to make their work more efficient and Bailey was allegedly denied the use of a hose by Hill, I am not satisfied that this fact necessarilly demonstrates a discriminatory motive on the part of Hill with respect to that particular assignment. Regardless of the obviously inefficient approach to cleaning the door (which in one sense may be indicative of a discriminatory motive), the fact remains that not much more was demanded of Bailey other than that he at least scrub on the door with the implements made available to him. No substantial significance appears to have been attached to the amount of time which was involved.[20] Moreover, notwithstanding my general lack of confidence in Hill's truthfulness, I have little doubt that if a hose were available (as Bailey testified), he would have simply picked it up and used it without asking Hill's permission to do so. Bailey repeatedly asserted that he engaged in numerous duties simply as a result of his own observation of what needed to be done. If this is so, it is likely that his natural initiative would have caused him to use an available hose. This conclusion is reinforced by the fact that Bailey's usual routine involved the scrubbing of floors where the use of the hose was commonplace. It simply stretches my imagination too far to believe that Bailey, seeing that a hose would assist his undesirable task to a considerable extent, would not have seized the first opportunity. Hence, I am unable to conclude that Bailey was denied the use of an available hose and told time and again to redo the door as a part of a grand plot on Hill's part to rid himself of a budding union activist.

Nonetheless the conspicuous presence of Infante for the alleged purpose of confirming Hill's judgment with respect to how dirty the door was fuels the suspicion that Hill's true object was to frame Bailey. If, as Hill described, he could wipe mud from the door when Bailey first indicated that he was finished washing it, it is most unlikely than any person would need the assistance of a subordinate to aid in arriving at the conclusion that the

[20] Although Bailey testified that Hill told him at one point to hurry up as he had something else for him to do, the circumstances do not suggest that Hill was on the verge of disciplining Bailey in any fashion.

door needed further cleaning. On the other hand, Infante's presence is equally or more explainable as the product of Hill's insecurity in dealing with an employee whom he perceived to be troublesome from two perspectives: (1) Hill's stated belief (which I credit) that Bailey thought of him as a racist and, (2) Hill's knowledge that Bailey had become increasingly active in the Union and that the Union was a sensitive subject to the Respondent in general. Hill's story that he gave Bailey two or three opportunities to change his mind and wash the door is corroborated in part by Infante. This fact supports the conclusion that, in dealing with Bailey, Hill was less than sure of himself and lends credence to the judgment that I have made that Hill did not act precipitously to discharge Bailey at his first refusal to wash the door as would be expected if the whole purpose of the exercise was to set Bailey up for discharge. Based on Hill's stated views of unions in general, and Bailey's increased affinity for the Union, there is little doubt that Hill was probably delighted at the opportunity which the December 26 incident presented. However, the fact that Bailey presented Hill with an opportunity which Hill relished is not enough. *Berland Paint City*, 199 NLRB 927 (1972). Accordingly, it is my conclusion that the evidence is insufficient to show that the December 26 assignment was discriminatorily motivated or that it was unreasonably onerous. Therefore, I find that the allegations that Bailey was assigned a more onerous task on December 26 and was subsequently discharged for refusing to perform that task has not been proven by a preponderance of the credible evidence.

The General Counsel has also alleged that the wall scrubbing assignment on December 18 was designed to discriminate against Bailey and argues that this assignment involved a less desirable and more arduous task. Although Bailey's testimony in this respect tends to show that Hill's assignment on this particular evening was motivated as a result of Bailey's distribution of literature to Martinez, the evidence of the Respondent shows that the tow-motor operators have lunch schedules which were different from the other employees and that Martinez' lunch break was such that Martinez and Bailey did not have concurrent breaks. Knowledge of this fact would make it quite reasonable for Hill to conclude that one of the two men was on work time when Bailey was distributing union literature. The General Counsel chose not to rebut this evidence. Hence, even if the inference is made that the wall washing assignment on December 18 resulted directly from Hill's being perturbed at Bailey for giving out literature, the only conclusion permitted by the evidence here is that it had to have occurred on someone's worktime. For this reason, the General Counsel's case fails as there was no showing that Bailey's activity was protected. Accordingly, I find that the General Counsel has failed to prove the allegation that the Respondent violated the Act by assigning Bailey a more arduous and less desirable task on or about December 18.

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by instructing an employee not to speak about the Union while on the job. This allegation is based upon Bailey's version of Hill's statement to him in the truck gassing area on the evening of December 18. Believing as I do that Hill was motivated to act in that instance on the basis of Martinez' complaint, I find that Hill's version of the events more accurately reflects the statements made by him that evening. As Hill's testimony shows that he warned Bailey against distribution on work time, I find that the Respondent did not violate Section 8(a)(1) of the Act by such action.

The complaint also alleges that employees were told on December 11 that they would be denied wage increases because of the Union. In support of this allegation, the General Counsel offered Bailey's testimony that Hill informed him (in the presence of two other employees) that their wages would be frozen because of the pending union matter in the course of the December 11 conversation wherein Teague and Vasquez' arrest was protested by Bailey. Hill denied making such a statement. As the General Counsel failed to elicit the testimony of the two other employees as to this statement or explain his failure to do so, it is reasonable to infer that they would not have corroborated Bailey's testimony. Accordingly, I find that the General Counsel has failed to prove the allegation of the complaint in this regard.

C. *Other Alleged Interference, Restraint, and Coercion*

The complaint alleges that on December 12 Supervisor Hill violated Section 8(a)(1) of the Act by interrogating an employee about his union affiliation and by creating an impression of surveillance by telling an employee that he knew the union proclivities of other employees. The answer denies this allegation.

In support of this allegation, the General Counsel offered the testimony of Willie Jones, an employee at the Hardy Street warehouse who worked on the second shift under Supervisor Hill. According to Jones, Hill called him to his office on or about December 18 and asked if he were in the Union. When Jones told Hill that he was not, Hill told Jones that he did not have to lie to him, that he knew Bailey and Scott, another Hardy Street employee, were in the Union. Jones testified that he told Hill that he did not know that to be a fact but that he was not a member.

According to Hill, in mid-December he took over the task of soliciting memberships for the Respondent's credit union. As a part of this assignment, Hill had a conversation with Jones wherein he asked Jones if he "belonged to the union, Coca-Cola Bottling Company," meaning the credit union. Hill testified that Jones told him in essence that he did not belong and that he would not belong. When Hill said that he wanted to explain the benefits, Jones cut him off saying, "I don't want to talk about no union." Notwithstanding this abrasive response Hill said he received from this innocuous solicitation of Jones and the attendant problems with the Union at that particular time, Hill testified that he never did clarify that he was talking about the credit union.

Hill's explanation of his approach is farfetched, preposterous, and comports with other efforts on his part while testifying to be misleading. Although it may be true that on cross-examination Jones became confused about the date of the conversation, there is agreement between

both Hill and Jones that a "union" conversation occurred within the relevant time frame of mid-December. Accordingly, on the basis of Jones' testimony as to the substance of the conversation, which I credit, I find that Hill did interrogate Jones with respect to his union membership and that he left Jones with the impression that the membership status of employees was being kept under surveillance as alleged in the complaint. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act in this regard. *PPG Industries, Inc.*, 251 NLRB 1146 (1980).

D. *The Objections*

Having concluded that the Respondent violated Section 8(a)(1) and (5) of the Act as a result of its activities in connection with the access issues discussed above and again in connection with Hill's statements to Jones on December 18, I recommend that the election held in Case 23-RD-444 be set aside. In this connection, it is the Board's usual policy that the commission of a serious unfair labor practice is, *a fortiori*, grounds upon which to set aside the results of an election. In this instance, however, my recommendation is grounded principally, if not solely, upon my findings related to the access questions presented herein and the consequent arrest of Teague and Vasquez in the presence of a number of employees and not upon the isolated unfair labor practice related to the interrogation of Jones on December 18. These actions all occurred in the period specified by the Board for conduct which may be considered as the basis for objections to an election. *Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961). Although it is true that the events upon which my recommendation is based occurred slightly more than 3 months before the election and for this reason might be thought to have had little impact on the election, I would respectfully disagree with any such analysis. The severe restriction of access which has occurred here and the arrest of the two union officials who persisted in asserting the collectively bargained right of access to the unit employees strikes at the heart of the Union's ability to fulfill its statutory obligations to represent employees which continues notwithstanding the filing of the decertification petition and thus makes it appear as weak and ineffectual. As the arrest of the union officials immediately followed the widespread distribution of a letter from the Respondent's president which calls particular attention to the fact that a number of employees already question the effectiveness of the Union, and which announces that the collective-bargaining process and wages are going to be in a state of limbo for the duration of the election period, it is most likely that the perceived value of the labor organization to the employees during this period would be all the more diminished. Hence, whether what occurred here was by design or not, it is my conclusion that the Respondent's conduct, especially on December 11, represents an unusually serious interference with the right of employees to deal with their employer through representatives of their own choosing, a right which is fundamental under this Act. Accordingly, I sustain the Union's objections to the election to the extent that they coincide with the unfair labor practices found herein and I recommend that the election be set aside and that a new election take place at a time deemed appropriate by the Regional Director. It is further recommended in this connection that the Regional Director include in the notice of election to be issued the following paragraph consistent with the Board's decisions in *The Lufkin Rule Company*, 147 NLRB 341 (1964), and *Bush Hog, Inc.*, 161 NLRB 1575 (1966):

Notice to All Voters

> The election conducted on April 17, 1980, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of the Respondent found to exist in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having concluded that the Respondent has violated the Act in the manner specified above, it is recommended that the Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

It is specifically recommended that the Respondent rescind the restrictive rules concerning access to its premises announced by Ferguson and Clinton on December 13 and 14, respectively, and continue to adhere to the access provisions of article VI, section 7, of the expired collective-bargaining agreement under the conditions specified in Clinton's letter of November 20, 1979, so long as the Union remains the representative of Respondent's employees and no adequate offer of an opportunity to bargain concerning a modification is made or an impasse is reached in bargaining over a change in the access provision. In particular, it is recommended that the Union's right of access be specifically subject to the Respondent's right to accompany union representatives in all production areas of its facilities for the purpose of insuring compliance with all rules and regulations of the Respondent necessary to maintain proper safety and continued production as contemplated specifically by the collective-bargaining agreement. It is also recommended that the Respondent be ordered to post the attached notice to employees at all of its locations which employ represented employees and thereafter notify the Regional

Director for Region 23 of the steps it has taken to comply with the recommended Order entered hereafter.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act and engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since May 31, 1978, the Union, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the employees in the unit described below for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. The appropriate unit is:

> All production and maintenance employees of the Respondent at its facilities described by the Board in its May 31, 1978 Decision and Certification of Representative in Case 23-RC-4503, but excluding all other employees, office clerical employees, sales drivers and sales driver trainees, account managers' merchandisers, dispatchers, Tele-Sale personnel, watchmen, guards and supervisors as defined in the Act.

4. By refusing to permit access by agents of the Union to its premises pursuant to the provisions of article VI, section 7, of the collective-bargaining agreement in effect between the Respondent and the Union from November 17, 1978, through November 30, 1979, by causing the arrest of agents of the Union who entered upon the Respondent's premises on December 11, 1979, pursuant to the provisions of the aforesaid collective-bargaining agreement, and by interrogating Willie Jones and making statements to him which created the impression that the union activities of employees were being kept under surveillance by the Respondent, the Respondent violated Section 8(a)(1) of the Act.

5. By unilaterally changing the terms and conditions of the collective-bargaining agreement in effect between the Respondent and the Union on December 13 and 14, 1979, with respect to the application of article VI, section 7, therein, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By engaging in the acts and conduct described above in paragraphs 4 and 5, the Respondent has engaged in conduct which interfered with the results of the election conducted on or about April 17, 1980.

7. There is insufficient evidence to establish that the Respondent violated the Act in any manner alleged in the complaint other than as set forth above.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Great Western Coca-Cola Bottling Company, d/b/a Houston Coca-Cola Bottling Company, Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally altering the provisions of article VI, section 7 of the collective-bargaining agreement in effect between the Respondent and Sales Drivers, Deliverymen, Warehousemen & Helpers Local 949, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, from November 17, 1978, through November 30, 1979.

(b) Refusing to permit union officials access to its premises pursuant to the collective-bargaining agreement in effect between the Respondent and the Union from November 17, 1978, through November 30, 1979, as specified in the section above entitled "The Remedy."

(c) Causing the arrest of officials of the Union who enter upon its premises pursuant to the provisions of the above-mentioned collective-bargaining agreement, article VI, section 7.

(d) Interrogating employees with respect to whether or not they have executed union membership or authorization cards and making statements to employees which imply that the Respondent is maintaining surveillance over their union activities.

(e) In any other like manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by a lawful agreement in accordance with Section 8(a)(3) of the Act, or refusing to bargain with the Union as required by Section 8(a)(5) and 8(d) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Rescind the unilateral changes made to article VI, section 7, of the collective-bargaining agreement in effect from November 17, 1978, through November 30, 1979, which were made on December 13 and 14, 1979, and restore access by the Union in the manner specified in the above section entitled "The Remedy."

(b) Post at all of its locations in the Houston metropolitan area copies of the attached notice marked "Appendix."[22] Copies of the said notice, on forms provided by the Regional Director for Region 23, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that such notices as are posted on its premises are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director of Region 23 within 20 days from the date of this Order, what steps it has taken to comply with its terms.

IT IS FURTHER RECOMMENDED that the election conducted on April 17, 1980, in Case 23–RD–444, be set aside and that said case be remanded to the Regional Director for Region 23 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a collective-bargaining representative.

IT IS FURTHER RECOMMENDED that the complaint be, and it hereby is, dismissed insofar as it alleges other unfair labor practices not specifically found herein.